

Office of the Yavapai County Attorney

255 E. Gurley Street

Prescott, AZ 86301

Phone: (928) 771-3344 Facsimile: (928) 771-3110

1 Sheila Polk, SBN 007514
2 County Attorney
3 ycao@co.yavapai.az.us

4 Attorneys for STATE OF ARIZONA

5 IN THE SUPERIOR COURT

6 STATE OF ARIZONA, COUNTY OF YAVAPAI

7 STATE OF ARIZONA,

8 Plaintiff,

9 vs.

10 JAMES ARTHUR RAY,

11 Defendant.

V1300CR201080049

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REPLY TO DEFENDANT'S RESPONSE TO
STATE'S MOTION FOR RECONSIDERATION
RE: UNDER ADVISEMENT RULING ON
DEFENDANT'S MOTION IN LIMINE (NO. 1)
TO EXCLUDE EVIDENCE OF PRIOR ACTS
PURSUANT TO ARIZ. R. EVID. 404(B) and 403

(The Honorable Warren Darrow)

27 Comes now the State of Arizona, through undersigned counsel, and respectfully replies to
28 Defendant's Response to the State's Motion for Reconsideration of this Court's ruling of
29 February 3, 2011, holding that evidence of sweat lodge participants' physical or medical distress
30 following previous sweat lodge ceremonies is inadmissible at trial. This reply is supported by the
31 following Memorandum of Points and Authorities.

32 **MEMORANDUM OF POINTS AND AUTHORITIES**

33 A. There is good cause to reconsider the order precluding the State from
34 introducing evidence of the physical and medical distress suffered at the prior sweat lodge
35 ceremonies.

36 This Court found the State has proven by clear and convincing evidence that some
participants in the prior sweat lodge ceremonies exhibited signs and indications that a reasonable
person would associate with unusual or abnormal physical or mental conditions. *Under*

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1 *Advisement Ruling*, 2/3/11 at 2. Thus this Court has already found that the evidence the State
2 seeks to admit has been proven under the requisite standard set forth in *State v. Terrazas*, 189
3 Ariz. 580, 944 P.2d 1194 (1997).

4 We believe there are important reasons to apply a clear and convincing standard,
5 rather than some lesser standard, to evidence of prior bad acts. Such evidence is
6 quite capable of having an impact beyond its relevance to the crime charged and
7 may influence the jury's decision on issues other than those on which it was
received, despite cautionary instructions from the

8 *State v. Terrazas*, 189 Ariz. 580, 584, 944 P.2d 1194, 1198 (1997).

9 Notwithstanding this finding, this Court has ruled the State cannot present this evidence
10 to the jury. Contrary to Defendant's claim that admitting this evidence would violate Rule 403
11 and Rule 404, Ariz. R. Evid., the reality is the exact opposite. It is the exclusion of this evidence,
12 not the inclusion, that will mislead the jury. The impact of this Court's ruling is that the jury will
13 not hear a full and accurate presentation of the facts in this case.

14 This trial is a search for the truth. In order for the jury to have an accurate presentation of
15 the facts, evidence of the prior sweat lodge ceremonies and the physical reactions of the prior
16 sweat lodge participants must be allowed. Since 2003, Defendant has been selling the "Spiritual
17 Warrior" Seminar; an event where the culmination is a two to three hour sweat lodge ceremony.
18 The sweat lodge used in 2009 was the same sweat lodge constructed for the ceremony in 2008.
19 The exact same coverings used in 2009 were used in 2008. Several of the participants and
20 witnesses to the 2009 ceremony had participated or been involved in the prior sweat lodge
21 ceremonies. Prior to entering the sweat lodge in 2009, the Defendant made repeated references to
22 the symptoms they would experience, leading participants to believe such symptoms were
23 normal and safe. All of this information will be presented to the jury.
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1 With this Court's ruling, the one fact that will not be presented is that following the prior
2 sweat lodge ceremonies, some participants experienced "vomiting, problems with balance,
3 disorientation or incoherence, unresponsiveness, shaking violently or convulsions, and apparent
4 loss of consciousness." *Under Advisement Ruling*, 2/3/11 at 2. This Court's ruling forces the jury
5 to consider the facts of the case under a blatantly misleading premise: that no one had ever
6 suffered any ill effects from the previous ceremonies. Such an unfair presentation of the facts
7 should not be allowed and is contrary to the interests of justice.
8

9 "The trier of fact is entitled to have the disputed occurrence fixed in a background of the
10 surrounding and accompanying events. These events shed light on the main issue and are
11 received though they incidentally show that the accused has committed another crime." *State v.*
12 *Norgard*, 6 Ariz.App. 36, 39, 429 P.2d 670, 673(App. 1967) (quoting Udall, Arizona Law of
13 Evidence s 115, pp. 229-30.)
14

15 As the Arizona Supreme Court has noted, "[e]xplanation of events which occur before
16 and after a crime can be admitted in order that the full story be understood." *State v. Cook*, 150
17 Ariz. 470, 472, 724 P.2d 556, 558 (1986), citing *State v. Richmond*, 114 Ariz. 186, 194, 560 P.2d
18 41, 49 (1976), *cert. denied*, 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1977).
19

20 In requesting the admission of this evidence, the State has *never* sought to admit
21 "character evidence" of Defendant. However, as the State has repeatedly argued, the evidence of
22 the prior sweat lodge ceremonies is relevant to the mental state of both the Defendant and the
23 participants, is necessary to complete the story for the jury, and is not unduly prejudicial.
24 Contrary to Defendant's argument, the State has shown good cause for this Court to reconsider
25 its previous ruling.
26

1 **B. The indictment constitutes a charge of both the greater offense of Manslaughter**
2 **and the lesser included of Negligent Homicide.**

3 Pursuant to Rule 13.2(c), Ariz. R. Crim. P., "Specification of an offense in an indictment,
4 information, or complaint shall constitute a charge of that offense and all offenses necessarily
5 included therein." Based on the plain language of the Rule, Defendant has been on notice since
6 he was indicted that the charge of manslaughter constituted a charge of the necessarily included
7 offense of negligent homicide. Contrary to Defendant's argument, the State does not intend "to
8 try the case to prove *only* the lesser included offense of negligent homicide." The State believes
9 the evidence proves Defendant is guilty of all three counts of manslaughter.

10 Like the stages of heat-related illnesses at issue in this case, the mental states for
11 negligent homicide and manslaughter lie along a continuum of *mens rea*. Arizona Revised
12 Statute § 13-202(C) states that "[i]f a statute provides that criminal negligence suffices to
13 establish an element of an offense, that element also is established if a person acts intentionally,
14 knowingly or recklessly."

15 In order for the State to prove the *mens rea* for manslaughter, the State must establish
16 Defendant was aware of and consciously disregarded a substantial and unjustifiable risk that
17 death would occur. The risk must be of such nature and degree that disregard of such risk
18 constitutes a gross deviation from the standard of conduct that *a reasonable person* would
19 observe in the situation. A.R.S. § 13-105(c) (emphasis added). Whether or not the State meets
20 this burden is ultimately the decision of the jury.

21 A reasonable person is aware that exposure to heat can kill. Every year children and
22 animals die from heat stroke as a result of being left in hot vehicles. This fact is well publicized.
23 A reasonable person, regardless of his or her background, is well aware of this fact. Whether a
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1 reasonable person is aware of the substantial and unjustifiable risk that people left in heated
2 enclosed spaces can die is a question for the jury. Whether a reasonable person who facilitates
3 sweat lodge ceremonies, with Defendant's training and experience in conducting sweat lodge
4 ceremonies since 2003, is aware of the substantial and unjustifiable risk that death can occur to
5 those left in heated enclosed spaces is a question for the jury.

6
7 Defendant was in the business of selling the Spiritual Warrior Seminar, an event that
8 since its inception included a two to three hour sweat lodge ceremony with the goal of creating
9 for participants "threshold experiences" and "altered mental states." At the initial hearing on the
10 404(b) motion, Amayra Hamilton testified Defendant repeatedly insisted his sweat lodges be
11 hotter. *Transcript*, 11/9/10 at 14:13-15; 15:12; 19:6-11. At trial, the State will prove Defendant
12 was intent on placing as many participants as possible into an altered mental state, a widely
13 recognized symptom of heat stroke. Despite the various signs and symptoms of medical distress
14 that occurred in Defendant's previous sweat lodge events, Defendant continued to push the heat
15 in order to cause "altered mental status" for his participants.

16
17 In the cases cited by Defendant, courts have considered the concept of how "a
18 hypothetical reasonable person is to be defined." In *In re William G.*, 192 Ariz. 208, 963 P.2d
19 287 (App. 1997), the Court held that "riding in shopping cart in a parking lot when done by a
20 fifteen year old is an activity that must be judged by the standards of fifteen year olds of like age,
21 intelligence and experience." *Id.* at 214, 963 P.2d at 293. Similarly, in *State v. Far West Water*,
22 224 Ariz. 173, 228 P.3d 909 (App. 2010), the Court addressed the concept of how reasonable
23 persons should be judged in a corporate context. The Court noted that both of the defendants
24 "were industry professionals with extensive training and experience in sewage treatment plants."
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1 *Id.* at 192, 228 P.3d at 928. Using this standard, the Court found that a reasonable jury could find
2 the defendants “knew and understood” the standards relating to their profession and actually “did
3 more than ‘fail to perceive a substantial and unjustifiable’ risk of death or serious physical injury
4 for purposes of criminal negligence; they acted recklessly by being ‘aware of’ and ‘consciously
5 disregard[ing] a substantial and unjustifiable risk” of death or serious physical injury for
6 purposes of aggravated assault and endangerment.” *Id.* at 193, 228 P.3d at 929.

8 In the instant case, Defendant was a professional in the business of providing seminars
9 that placed participants into situations where they were faced with extreme challenges to create
10 “threshold experiences” in order to grow mentally, physically, spiritually, financially and in
11 relationships. Spiritual Warrior was a five day seminar that included many activities including a
12 36 hour fast in the desert leading up to the ultimate challenge, a sweat log. The ceremony
13 consisted of extended exposure to high intensity heat, intentionally designed to place participants
14 into “an altered state.”

16 Defendant wants this Court to ignore the fact that all of the events of the week are
17 relevant, designed to condition and groom participants throughout the week to do whatever
18 Defendant told them to do. The week long seminar was designed to make participants believe
19 that “threshold experiences” and “altered states” were necessary to accomplish Defendant’s
20 promised rewards; and ultimately to ignore their bodies’ symptoms of heat-related injuries.
22 Defendant offers nothing substantive to this Court to indicate that the State’s theory, based on
23 Defendant’s audio of the entire week’s events, is inaccurate. At trial, the jury will hear
24 Defendant’s own words from Day One through Day Five of his Seminar. Throughout the event,
25 Defendant tells participants that he will facilitate for them “threshold experiences” and “altered
26 states” to help them grow. The recordings speak for themselves, confirm Defendant’s intentions,

1 and confirm the participants' mental states as they entered Defendant's sweat lodge on October
2 8, 2009.

3 As this Court is aware, the State had to litigate Defendant's disclosure of the Spiritual
4 Warrior 2009 recordings. The State did not receive the recordings until January 28, 2011. The
5 State's evidence list filed on January 31, 2011 provided notice of the State's intention to use the
6 recordings at trial. The recordings provide incontrovertible evidence in the form of Defendant's
7 own statements that Defendant's ultimate goal for the week was to create threshold experiences,
8 and the goal for the sweat lodge was to place participants into altered states.

9
10 **C. The prior sweat lodge ceremonies are relevant to rebut Defendant's defense that**
11 **some unknown toxin caused the deaths of the victims.**

12 On January 31, 2011, months after the hearing on Defendant's 404(b) motion, the State
13 was finally able to interview Defendant's expert witness, Dr. Ian Paul.¹ During the interview, Dr.
14 Paul presented his opinion that he could not rule out the cause of death of the three victims from
15 organophosphate poisoning. Moreover, Dr. Paul informed the State that he had formed this
16 opinion in late May and that his opinion had not changed since that time. Notwithstanding this
17 knowledge, there was no mention of organophosphate poisoning in Dr. Paul's report nor has
18 Defendant ever requested testing for the presence of organophosphates on any of the victims.

19
20 The State is now on notice that Defendant intends to introduce Dr. Paul's opinion that he
21 could not rule out cause of death due to organophosphate poisoning. This new information
22 makes the fact that past participants also experienced classic signs of heat stroke in the same
23


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25
26 ¹ The State had made repeated requests to interview Dr. Paul, but was informed he had not
finished his review. The State received Dr. Paul's report on January 10, 2011 and was
subsequently permitted by the defense to interview him on January 31, 2011.

1 sweat lodge structure as used in 2009 relevant. It rebuts Defendant's attempt to convince the jury
2 that the victims died in 2009 from something other than their exposure to extreme heat
3 conditions. This is a proper purpose for admission. *See State v. Herrera*, 226 Ariz. 59, ¶17, 243
4 P.3d 1041, 1047(App. 2010) (Other act evidence was relevant for several reasons, including
5 rebutting the defendant's defense that victim had fabricated accusations.) See also *Estelle v.*
6 *McGuire*, 502 U.S. 62, 69, 112 S.Ct. 475, 481 (1991) (By eliminating the possibility of accident,
7 evidence of victim's prior injuries was probative to issue of intent, especially in light of the
8 defendant's claim of accident.)

CONCLUSION

11 Evidence is relevant if it "has any tendency to make the existence of any fact that is of
12 consequence to the determination of the action more probable or less probable than it would be
13 without the evidence." Ariz. R. Evid. 401. The evidence of past participants' physical and mental
14 conditions after participating in Defendant's sweat lodges is relevant to the mental state of both
15 the Defendant and the participants, and to rebut Defendant's defense. It is also necessary to
16 complete the story for the jury and is not unduly prejudicial. Contrary to Defendant's argument,
17 the State has shown good cause for this Court to reconsider its previous ruling.

19 Respectfully submitted this 24th day of February, 2011.

21 By 
22 SHEILA SULLIVAN POLK
23 YAVAPAI COUNTY ATTORNEY

24 **COPIES** of the foregoing emailed this
25 24th day of February, 2011:

26 Hon. Warren Darrow
Dtroxell@courts.az.gov

COPIES of the foregoing delivered this
24th day of February, 2011, to

Thomas Kelly
Via courthouse mailbox

Office of the Yavapai County Attorney

255 E. Gurley Street

Prescott, AZ 86301

Phone: (928) 771-3344 Facsimile: (928) 771-3110

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Thomas Kelly
tkkelly@thomaskellypc.com

Truc Do
Tru.Do@mtto.com

By: _____

Truc Do
Munger, Tolles & Olson LLP
355 S. Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560

Via U.S. Mail

By: _____